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No. 02-1531

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LAURA A. FINDLEY, *et al.*,

Petitioner,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the state court below correctly applied its own state retroactivity law in accordance with this Court's precedents recognizing the authority of the States to determine the retroactive or prospective effect of their own rulings on matters of state law.

RULE 29.6 STATEMENT

Respondent State Farm Mutual Automobile Insurance Company is a mutual insurer owned by its policyholders. It has no parent corporations and no publicly held company owns 10% or more of its stock.

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STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

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On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

BRIEF IN OPPOSITION

As the petition for certiorari candidly acknowledges, this case concerns "the application of decisions made by a state's highest court on a question of *state* law." Pet. 7 (emphasis added). Applying its own retroactivity law, the West Virginia Supreme Court of Appeals declined in this case to give retroactive effect to one of its own rulings on a matter of state insurance law. Among other things, the court concluded that retroactive application of its ruling would impose "augmented substantive liabilities that did not clearly exist prior to the announcement of" that ruling. Pet. App. 30-31. Petitioner argued that the court's prospective application of its ruling violated the federal Constitution, and that the court should follow federal retroactivity law instead. The court rejected that contention, and the present petition followed.

The petition should be denied. The decision below does not conflict with any of this Court's precedents. As this Court established long ago, "[a] state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Great Northern Ry.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 364 (1932). Nor does the decision below conflict with any federal court of appeals or state court decision. Indeed, each of the state court retroactivity cases cited in the petition recognize that the States are free to apply their own retroactivity rules to their own rulings on matters of state law. That is just what the state court below did.

STATEMENT OF THE CASE

In *Mitchell* v. *Broadnax*, 537 S.E.2d 882 (W. Va. 2000), the West Virginia Supreme Court of Appeals held that a provision in West Virginia's uninsured motorist statute allowed insurers to incorporate uninsured motorist exclusions in automobile insurance policies so long as insurers "adjust[ed] the corresponding policy premium so that the exclusion [was] consistent with the premium charged." *Id.* at 893 (quotation omitted). *See* W. Va. Code § 33-6-31(k). The court also held that insureds could pursue a cause of action against insurers to enforce that requirement. *Id.* Because the court was unable to determine from the record in that case whether the insurer had complied with the statutory requirement, the court remanded the case "for further proceedings consistent with [its] opinion." *Id.* at 894.

After *Broadnax* was issued, petitioner Laura A. Findley filed a putative class action in the circuit court of Barbour County, West Virginia, alleging, among other things, that respondent State Farm Mutual Automobile Insurance Company had incorporated exclusions in its policies without making corresponding adjustments to premiums. The circuit court granted summary judgment in favor of State Farm on numerous grounds. Among other things, the court concluded

that Findley did not have standing to assert a cause of action under *Broadnax*. *See* Pet. App. 3.

The West Virginia Supreme Court of Appeals affirmed the circuit court's ruling that Findley could not assert a cause of action under *Broadnax*. Pet. App. 33. Because the policy containing the language Findley sought to challenge was issued in 1991, the Court had to consider whether to "retroactively apply [its] holdings in *Mitchell* v. *Broadnax* so as to bring within its scope an insurance contract which was entered into before [the] Court's decision therein." Pet. App. 28. The court explained that "[w]hen such a request for retroactivity is made, we cautiously consider whether such retrospective application is indeed warranted." *Id*. The court then set forth its longstanding rule on retroactivity:

> "In determining whether to extend full retroactivity, the following factors are to be considered: First, the nature of the substantive issue overruled must be determined. If the issue involves a traditionally settled area of law, such as contracts or property as distinguished from torts, and the new rule was not clearly foreshadowed, then retroactivity is less justified. Second, where the overruled decision deals with procedural law rather than substantive, retroactivity ordinarily will be more readily accorded. Third, common law decisions, when overruled, may result in the overruling decision being given retroactive effect, since the substantive issue usually has a narrower impact and is likely to involve fewer parties. Fourth, where, on the other hand, substantial public issues are involved, arising from statutory or constitutional interpretations that represent a clear departure form prior precedent, prospective application will ordinarily be favored. Fifth, the more radically the new decision departs from previous substantive law, the greater the need for limiting retroactivity. Finally, this Court will also look to the precedent of other courts which have determined the retroac-

> tive/prospective question in the same area of the law in their overruling decisions." [Pet. App. 28-29 (quoting *Bradley* v. *Appalachian Power Co.*, 256 S.E.2d 879, 880-881 (W. Va. 1979)).]

Applying those criteria, the court held that its decision in *Broadnax* should not be applied retroactively to this case. "In short," the court held, "retroactivity is not warranted because our decision in *Mitchell* involved a matter of substantive law, namely W. Va. Code § 33-6-31(k), which had, prior to our decision therein, received sparse treatment in our judicial decisions and had not been amended by the Legislature since its original enactment in 1979." Pet. App. 29-30. "Given this dearth of interpretative authority," the court concluded, "it goes without saying that the holdings announced in *Mitchell* were not 'clearly foreshadowed.' " Pet. App. 30.

Moreover, the court held, "the substantial public policy issues implicated in our holdings, and explicitly identified by the Legislature in [the uninsured motorist statute], mitigate in favor of a rule of prospectiveness." *Id.* "Finally," the court concluded, "while we have long held exclusions in insurance policies to be valid, we had not, prior to *Mitchell*, delineated the express requirements therefor contained in [the statute]." *Id.* (footnote omitted). Thus, "in order to shield insurers from the imposition of augmented substantive liabilities that did not clearly exist prior to the announcement of" its holdings in *Broadnax*, the court "declined to apply [those] holdings * * * retroactively." Pet. App. 30-31.

Findley sought rehearing, arguing that the court erred as a matter of "federal constitutional law" by applying its own retroactivity law in deciding whether to give *Broadnax* prospective or retroactive effect. Pet. App. 77. In petitioner's view, the court was bound by this Court's precedents on federal retroactivity doctrine. The court denied her petition. *See* Pet. App. 67.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WITH THIS COURT'S CASES.

1. Petitioner contends that certiorari is warranted because the decision below conflicts with this Court's retroactivity decisions. She is quite mistaken. As Justice Cardozo observed more than a half century ago, "[a] state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward." *Sunburst*, 287 U.S. at 364. "The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature." *Id.* at 365. In other words, "[w]hen questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their *own* decisions." *American Trucking Ass'ns, Inc.* v. *Smith*, 496 U.S. 167, 177 (1990) (O'Connor, J.) (plurality opinion) (emphasis added). That understanding is entirely in keeping with this Court's recognition of the coordinate—and co-equal—role of the States in our federal scheme.

Nothing in *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529 (1991), or *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86 (1993), is to the contrary. *See* Pet. 8-10. In *Beam*, the Supreme Court of Georgia declined to apply one of *this* Court's rulings retroactively to a case arising from facts predating that decision. A majority of this Court agreed, as a matter of *federal* retroactivity law, that this Court's application of its ruling in the decision announcing it required retroactive application of that ruling in all later cases. *See* 501 U.S. at 532 (plurality opinion); *id.* at 544 (opinion of Justice White); *id.* at 547 (opinion of Justice Blackmun); *id.* at 548 (opinion of Justice Scalia). *See also id.* at 535 ("the antecedent choice-of-law question is a *federal* one where the rule at issue itself derives from *federal* law, constitutional or otherwise") (plurality opinion) (emphases added); *id.* at 540 ("the question is whether it is error to

refuse to apply a rule of *federal* law retroactively, after the case announcing the rule has already done so") (plurality opinion) (emphasis added).

Similarly, in *Harper*, the Virginia Supreme Court twice refused to give retroactive effect to one of *this* Court's rulings. Again, the Court held, as a matter of *federal* retroactivity law, that "this Court's application of a rule of *federal* law to the parties before the Court requires every court to give retroactive effect to that decision." *See* 509 U.S. at 90 (emphasis added). *See also id.* at 97 ("When this Court applies a rule of *federal* law to the parties before it, that rule is the controlling interpretation of *federal* law and must be given full retroactive effect in all cases still open on direct review") (emphases added).

Neither *Beam* nor *Harper* presumes to have any effect on *state* retroactivity doctrine when it comes to the effect of *state* court decisions. Indeed, in *Harper*, the Court expressly recognized that state courts are free to apply their own retroactivity rules to their own decisions on matters of state law. In refusing to apply this Court's ruling retroactively, the Virginia Supreme Court had invoked its own "state-law retroactivity doctrine," which provided that " 'consideration should be given to the purpose of the new rule, the extent of the reliance on the old rule, and the effect on the administration of justice of a retroactive application of the new rule.' " *Id.* at 99 (quoting *Fountain* v. *Fountain*, 200 S.E.2d 513, 514 (Va. 1973), *cert. denied*, 416 U.S. 939 (1974)). This Court held, however, that the Supremacy Clause "does not allow federal retroactivity doctrine to be supplanted by the invocation of a contrary approach to retroactivity under state law." *Id.* at 100. "*Whatever freedom state courts may enjoy to limit the retroactive operation of their own interpretations of state law* * * * cannot extend to their interpretations of federal law." *Id.* (emphasis added).

Quite unlike the state courts in *Beam* and *Harper*, the state court below did not refuse to give retroactive effect to one of this Court's decisions. Rather, the court merely applied its *own* retroactivity law to one of its *own* rulings on an issue of *state* law. That was entirely permissible under this Court's precedents, not to mention our constitutional design.

2. Petitioner's contention that *Beam* and *Harper* are premised on equal protection and due process grounds is also much mistaken. *See* Pet. 7, 9-10. To be sure, some of the Justices in *Beam* and the majority in *Harper* did refer to the principle of treating similarly situated litigants similarly. *See, e.g.*, 501 U.S. at 537, 547; 509 U.S. at 97. But neither decision held that retroactive application of this Court's rulings was compelled as a matter of equal protection or due process. To the extent members of the Court referred to equality principles, they did so solely as a matter of prudential considerations that, in their view, should govern constitutional adjudication in federal cases.

Writing for the plurality in *Beam*, for instance, Justice Souter stated that selective prospectivity "breaches the principle that litigants in similar situations should be treated the same." 501 U.S. at 537. But he was referring to that principle as "a fundamental component of *stare decisis* and the rule of law generally," not equal protection or due process, which are nowhere discussed in his opinion. *Id.* Indeed, as Justice Souter further explained, " '[w]e depart from this *basic judicial tradition* when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a 'new' rule of constitutional law.' " *Id.* at 537-538 (quoting *Desist* v. *United States*, 394 U.S. 244, 258-259 (1969) (Harlan, J., dissenting) (emphasis added).

In his opinion concurring in the judgment, Justice Blackmun also stated that "selective application of new rules violates the principle of treating similarly situated defendants

the same." *Id.* at 547. But he, too, "derive[d]" that principle "from the integrity of judicial review," not any constitutional mandate of equal protection or due process. *Id.* And while Justice Scalia, also concurring in the judgment, opined that selective prospectivity is "not allowed by the Constitution," *id.* at 548, he meant by Article III, not the Fifth Amendment's Due Process Clause or its equal protection component. *Id.* at 549.

In *Harper*, the Court noted that it was "mindful" of the " 'basic norms of constitutional adjudication' that animate[] [its] view of retroactivity in the criminal context." 509 U.S. at 97. The Court cited in that regard its decision in *Griffith* v. *Kentucky*, 479 U.S. 314, 323 (1987), which observes that "selective application of new rules violates the principle of treating similarly situated defendants the same," but nowhere states that selective prospectivity violates equal protection or due process. The Court also cited Justice Stevens's dissent in *American Trucking, supra*. *See* 509 U.S. at 97. But in stating that the Court had no constitutional authority "to treat similarly situated litigants differently," Justice Stevens did not invoke notions of equal protection or due process. 496 U.S. at 214. His view, too, was based on "legal principle" and "[f]undamental notions of *fairness* and *legal process*." *Id.* at 212, 214 (emphases added).

In recognizing long ago that state courts are free to apply their own retroactivity rules to state law decisions, this Court observed: "[W]e are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or the meaning of the judicial process." *Sunburst*, 287 U.S. at 366. *See also id.* at 364 ("We think the federal constitution has no voice upon the subject."). Nothing in this Court's later decisions even remotely suggests a departure from that settled precedent.

II. THERE IS NO CONFLICT IN THE STATE COURTS.

1. Although petitioner alleges a conflict among the state courts, each of the retroactivity cases cited in the petition as in conflict with the decision below are in fact in complete agreement that state courts may apply their *own* retroactivity law to rulings on questions of *state* law. *See* Pet. 13-15. In *State* v. *Baird*, 654 N.W.2d 105 (Minn. 2002), for example, the Minnesota Supreme Court decided, as a matter of its own retroactivity law, that its ruling on an issue of state criminal law in an earlier case applied retroactively to the case before it. In reaching that conclusion, the court noted that "[g]enerally, our rulings are given retroactive effect," but "[w]e have followed the lead of the United States Supreme Court, however, in making certain limited exceptions to the general rule." *Id.* at 110. Following the lead of this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), for example, the court had adopted a special circumstances test for retroactivity in civil cases. *Id.* at 111.

The court observed that "[t]he rationale behind the special circumstances test is that, in some cases, the disruptive effect retroactivity has on parties and their individual situations outweighs the countervailing interest in treating all similarly situated parties alike." *Id.* at 112. The court held, however, that the special circumstances test was "ill-suited to the present criminal case," where such concerns were not implicated. *Id.* Noting that "[i]t seems patently unfair to us to apply different rules to * * * two similarly situated defendants * * * simply because [one's] appeal reached us first," the court "decline[d] to apply the special circumstances test to the instant case." *Id.* at 113. Thus, in *Baird* the court not only applied its own retroactivity law, but made clear that in Minnesota selective prospectivity in civil cases is alive and well.

Likewise, in *State* v. *Garcia*, 29 P.3d 919 (Hawaii 2001), the Supreme Court of Hawaii applied its own retroactivity

law in holding that its ruling on an issue of state criminal law in an earlier case applied retroactively to all cases not yet final at the time it was issued. Indeed, the court expressly confirmed its ability to apply its own retroactivity law, emphasizing that "[w]e adhere to the view that '[w]hen questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions.' " *Id.* at 930 (quoting *American Trucking*, 496 U.S. at 177). As the court explained, "the development of our law on retroactivity has paralleled that of the federal cases in large respect." *Id.* Taking its cue from this Court, the court held that "when [we] announce[] a new rule that benefits a defendant and appl[y] the rule to the defendant in the case in which the rule is announced," the rule must be applied to all cases on direct review or not yet final at that time. *Id.* at 933 (citing *Griffith*, 479 U.S. at 328). Thus, the court decided to follow this Court's retroactivity doctrine in criminal cases, but *only* as a matter of its *own* retroactivity law. *See id.* at 932 n.19 (noting that this Court's precedents "would not appear to mandate that the states retroactively apply a new constitutional rule for criminal cases unless the rule was applicable to the states through the fourteenth amendment").

Davis v. *Moore*, 772 A.2d 204 (D.C. 2001), is to the same effect. There, the D.C. Court of Appeals also chose, as a matter of its own retroactivity law, to follow this Court's precedents in holding that a rule announced in an earlier decision applied retroactively to authorize the recomputation of certain criminal sentences calculated before that decision was issued. *Id.* at 226-227. The court recognized the distinction between federal and state retroactivity law, noting that it was "bound to follow *Griffith* and *Harper* in any case involving a new rule of federal law." *Id.* at 226 n.22. Because the court chose to "conform [its] jurisprudence to that of the Supreme Court," *id.* at 230, it concluded that

Griffith and *Harper* "mandate[d] retroactive application" in that case. *Id.* at 231. *See* Pet. 13.

2. Contrary to petitioner's assertion, not one of the state retroactivity cases cited in the petition "recognize that the application of a judicial decision on a selective basis presents federal constitutional problems." Pet. 13.[1] In *Baird*, the court held that applying different rules to two criminal defendants, merely because one appeal "reached [the court] first," 654 N.W.2d at 113, "would be to treat similarly situated criminal defendants differently." *Id.* at 112. The court never suggested, however, that giving prospective effect to a decision on a selective basis would amount to a federal constitutional violation. Indeed, as discussed, *Baird* makes clear that the court may apply selective prospectivity in the civil context, because "in some cases, the disruptive effect retroactivity has on parties and their individual situations *outweighs the countervailing interest in treating all similarly situated parties alike*." *Id.* (emphasis added).

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[1] Petitioner cites two decisions from California's intermediate court of appeals. *See* Pet. 14-15. Neither of those cases involved the determination of whether to give a ruling prospective or retroactive effect, but rather a quite unrelated issue—the validity of provisions of the California Rules of Court governing the publication of appellate opinions. *See Schmier* v. *Supreme Court*, 93 Cal. Rptr. 2d 580 (Ct. App.), *review denied*, No. S087534 (Cal.), *cert. denied*, 531 U.S. 958 (2000) (*Schmier I*); *Schmier* v. *Supreme Court*, 117 Cal. Rptr. 2d 497 (Ct. App. 2002) (*Schmier II*). Contrary to petitioner's assertion, the court in *Schmier I* did not "recognize[] that *Harper* and *Beam* are premised upon Due Process and Equal Protection grounds." Pet. 14. That was merely what the plaintiff had argued. *See* 93 Cal. Rptr. 2d at 585. In *Schmier II*, the court noted in dicta that selective prospectivity "*can* violate the constitutional guarantees of due process and equal protection." 117 Cal. Rptr. 2d at 502 n.4 (emphasis added). The plaintiff—and losing party—in *Schmier II* did not seek review of that decision in the California Supreme Court.

Likewise, in *Garcia*, the court also concluded that "selective application of new rules violates the principles of treating similarly situated defendants the same." 29 P.2d at 933 (quotation omitted). The equality principles invoked by the court were not rooted in the Equal Protection or Due Process Clauses, however, but rather the "ideal of administration of justice with an even hand." *See id.* (quotation omitted). The court's decision, moreover, does not purport to address selective prospectivity in the *civil* context.

Nor did the court in *Davis* suggest that selective prospectivity raises "federal constitutional problems." Indeed, the court observed that several provisions of the federal Constitution may in fact "preclude retroactive application of a rule of law." 772 A.2d at 229. Among the provisions the court identified as "embody[ing] antiretroactivity principles" was the Due Process Clause, *id.* at 229, which " 'protects the interests in fair notice and repose that may be compromised by retroactive legislation.' " *Id.* at 230 (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994)). Yet petitioner nonetheless ascribes to that court the conclusion that retroactive application of its ruling was compelled by the Due Process Clause.

* * *

The West Virginia Supreme Court of Appeals declined to apply its holdings in *Broadnax* to this case because, among other things, it determined that it would not be fair to impose on insurers "augmented substantive liabilities that did not clearly exist prior to the announcement of" those holdings. Pet. App. 30. The fact that the court's holdings in *Broadnax* may have been applied in *Broadnax* itself does not justify a different result, because the court would "only [have] hinder[ed] the cause of fairness by repeating the mistake." *Beam*, 501 U.S. at 551 (O'Connor, J., dissenting). This Court may have a different rule on selective prospectivity with respect to its own decisions, but the state court below

was free to determine, as a matter of its own retroactivity law, that it would not be fair to apply *Broadnax* retroactively in this case. That case-specific conclusion does not merit this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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